

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONALD GOOD,

Grievant,

v.

Docket No. 2014-1178-DOT

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Donald Good, filed a level one grievance against his employer, Respondent, Division of Highways (“DOH”) dated March 14, 2014, stating as follows: “Grievant qualified as a Level III Technician (DOP 8357).” As relief sought, Grievant seeks the following: “[t]o be made whole in every way including backpay from August 2013.”

A level one conference was conducted on April 28, 2014. The grievance was denied by decision dated May 19, 2014. The level two appeal was perfected on May 21, 2014. A level two mediation was conducted on September 17, 2014. On September 17, 2014, Grievant perfected his appeal to level three. A level three hearing was held on January 26, 2015, before Administrative Law Judge William B. McGinley at the Grievance Board’s Charleston, West Virginia, office.¹ Grievant appeared in person, and with his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Rachel L. Phillips, Esquire, DOH Legal Division. This matter became mature for decision on February 27, 2015, upon receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.

¹ This matter was reassigned to the undersigned Administrative Law Judge for administrative purposes on May 13, 2015.

Synopsis

Grievant sought to be reallocated to the position of Transportation Engineering Technician Level 3. Grievant completed the necessary forms and submitted them to his supervisor. Grievant's supervisor approved the same and forwarded them to the Human Resources Director for processing, but noted that Grievant lacked the written communication skills needed for the job and attached some examples of his writing. Upon receipt of the documents, the Human Resources Director reviewed the same, discovering numerous grammatical and typographical errors. Considering the errors in the forms and the supervisor's comments, the Human Resources Director concluded that Grievant lacked the qualifications for the position and did not forward the forms to the Division of Personnel ("DOP") for review for reallocation. Grievant asserts that Respondent's actions in failing to forward his reallocation request to DOP were improper. Grievant also alleges that Respondent acted in bad faith by delaying his reallocation and intentionally working him out of his classification for a year. Respondent denies Grievant's claims, and asserts that Grievant did not meet the qualifications for the position he sought, and that it had no obligation to forward the reallocation request to DOP. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Donald Good, was employed by Respondent as a Transportation Engineering Technician Associate Level 2. Respondent refers to

Grievant's position as Assistant Environmental Coordinator. Grievant works in the District One headquarters. Grievant has been employed in this position by Respondent DOH for six years; however, Grievant has been employed by Respondent for a total of seventeen years.

2. Craig Blakeman is the Environmental Coordinator in District One and is Grievant's supervisor.

3. Kathleen Dempsey is the Director of Human Resources for DOH.

4. John McBrayer is the District Engineer in DOH District One.

5. Grievant enrolled in and attended an associate degree program designed for advancement to a classification of transportation engineering technician level 3 at Bridgemont Community and Technical College.²

6. On June 13, 2013, Grievant was awarded the transportation engineering technician level 3 certification by Bridgemont Community and Technical College.³

7. On November 1, 2013, Grievant submitted a Position Description Form ("PDF") to Mr. Blakeman seeking to be reallocated to the position of transportation engineering technician level 3.⁴

8. On November 6, 2013, Grievant submitted a completed Job Content Questionnaire ("JCQ") to Mr. Blakeman in support of reallocation.⁵

² Now known as BridgeValley Community and Technical College.

³ See, Respondent's Exhibit 3.

⁴ See, Respondent's Exhibit 1, PDF. It is noted that Grievant has alleged that he had previously submitted a PDF and JCQ to Mr. Blakeman in June or July 2013, seeking the allocation after he received his certification. Grievant further alleged that Mr. Blakeman took no action on his request for reallocation at that time. However, Grievant did not present copies of these documents at the level three hearing, and he offered no other evidence to support his claims.

⁵ See, Respondent's Exhibit 2, JCQ.

9. The PDF and JCQ Grievant submitted to Mr. Blakeman in November 2013 contained many spelling and grammatical errors. Mr. Blakeman wrote in the Supervisor Review Section of the JCQ that Grievant was “not able to communicate in an understandable method of writing either by formal letter or e-mail.”⁶ Nonetheless, Mr. Blakeman signed the PDF and JCQ on November 20, 2013, and sent the same to Human Resources for further processing. However, before forwarding these documents to Human Resources, Mr. Blakeman attached some examples of Grievant’s writing, including emails, a review form, and a letter Grievant had written as a reference for a former employee.⁷

10. Upon receipt of Grievant’s PDF and JCQ and attachments, Kathleen Dempsey reviewed the same, and discovered the many errors. Ms. Dempsey found the documents confusing, and noted that Grievant’s name was even incorrect on the form.⁸ Given that the “ability to communicate effectively both orally and in writing” and the “ability to communicate effectively with the public and prepare written correspondence and reports” are listed in the “Knowledge, Skills and Abilities” section of the classification specifications for the transportation engineering technician level 3 position, Ms. Dempsey concluded that Grievant was not qualified to be a level 3 technician.⁹ As such, Ms. Dempsey did not forward Grievant’s documents to the Division of Personnel for processing. Ms. Dempsey sent the documents back to District One, and contacted District One management about getting Grievant help with his communication skills. Ms. Dempsey did not send the documents back to be corrected; she was essentially

⁶ See, Respondent’s Exhibit 2, JCQ pg. 17.

⁷ See, Respondent’s Exhibits 1 and 2.

⁸ See, testimony of Kathleen Dempsey.

⁹ See, Respondent’s Exhibit 6, classification specifications.

denying Grievant's request for reallocation.¹⁰ However, apparently, no one informed Grievant of this, or that his request for reallocation would not be forwarded to DOP. Also, no one informed him that he could directly submit his reallocation request to DOP.

11. Mr. McBrayer met with Grievant sometime after November 20, 2013, and apparently acknowledged some kind of problem with his reallocation going through, and recommended that he take remedial English classes to improve his communication skills. Thereafter, Grievant found an English course through Garnet Career Center and attended the same. The record is unclear as to the dates Grievant attended and completed this class. Grievant was not automatically reallocated when he completed this class. Respondent acknowledges that Grievant's communication skills improved as a result of taking this class.

12. As Grievant had seen no progress on his request for reallocation by March 14, 2014, he filed the instant grievance action.

13. Grievant again requested a reallocation to transportation engineering technician level 3 on July 2, 2014, by submitting another PDF to Mr. Blakeman. Mr. Blakeman signed the PDF on July 17, 2014, and forwarded the documents to Ms. Dempsey. This time, Ms. Dempsey approved the forms on July 30, 2014, and submitted them to DOP.¹¹ DOP's Classification and Compensation section received the forms on July 31, 2014.¹² DOP recommended that Grievant receive the reallocation on October 2, 2014.¹³ Grievant was reallocated effective October 16, 2014.¹⁴

¹⁰ See, testimony of Kathleen Dempsey.

¹¹ See, Respondent's Exhibit 3, PDF.

¹² See, Respondent's Exhibit 7, second page, copy of page 1 of the July 2, 2014, PDF, showing DOP's "received" stamp dated July 31, 2014.

¹³ See, Respondent's Exhibit 7.

14. On his own volition, Grievant took an English 101 course at BridgeValley Community and Technical College during the Fall of 2014, after he submitted his July 2014 request for reallocation.¹⁵

15. The classification specifications for the transportation engineering technician level 3 position list the following as the position's minimum qualifications: "[c]ertification as a Transportation Engineering Technician Certification Board at BridgeValley Community and Technical College."¹⁶

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant asserts that Respondent's failure to forward his reallocation paperwork

¹⁴ See, Respondent's Exhibit 8.

¹⁵ See, Grievant's Exhibits 1 & 2.

¹⁶ See, Respondent's Exhibit 6.

to DOP was improper, and that Respondent intentionally worked him out of his classification for a year, which was an act of bad faith. For this, Grievant is seeking only back pay, because he was reallocated to the level three technician position after the filing of this grievance. Respondent denies Grievant's claims, and argues that it was under no obligation to submit Grievant's reallocation paperwork to DOP because Grievant was not qualified for the transportation engineering technician level 3 position at that time as he lacked the required communication skills. Respondent asserts that it submitted Grievant for reallocation in July 2014, because he was then qualified for the position as his communication skills had significantly improved after taking the English class.

Neither party presented, or referenced, any rules, regulations, or policies regarding the process of requesting a reallocation, or the duties of the Respondent in processing paperwork for the same. Further, no evidence was presented to establish that Grievant was entitled to a reallocation automatically upon receiving his Transportation Engineering Technician Certification from Bridgemont Community and Technical College. Grievant appears to generally assert that Respondent's actions in failing to forward his reallocation paperwork to DOP were arbitrary and capricious, and that Respondent intentionally worked him out of his classification for a year, which is bad faith. Grievant alleged no violations of DOP or DOH policies.

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the

case.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

Further, the “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. See *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant alleged at the level three hearing that Respondent twice failed to forward paperwork he submitted for reallocation: once in June or July 2013, soon after he received his certification, and once in November 2013. It is noted that the only evidence offered to support Grievant’s claim that he submitted a JCQ and PDF to Mr. Blakeman in June or July 2013 was Grievant’s testimony. Grievant did not present

copies of these documents, and no other witness testified to having any knowledge of a June or July submission. Grievant has the burden of proof in this grievance, and he has not met his burden with respect to his claims of a June or July 2013 submission; he has only made allegations. Therefore, such will not be addressed any further herein. No one disputes that Grievant submitted a JCQ and PDF in November 2013 seeking the reallocation, and documentary evidence was presented to support the same. Further, the November 2013 submission was the main focus of this grievance and the level three hearing.

The evidence presented establishes that Grievant submitted the PDF and JCQ to Mr. Blakeman on November 1, 2013, and November 6, 2013, respectively. Mr. Blakeman approved the same in a timely fashion and forwarded the same to Ms. Dempsey on November 20, 2013. However, Mr. Blakeman noted in the supervisor's section of the forms that Grievant lacked the ability to "communicate in an understandable method of writing either by formal letter or e-mail." Mr. Blakeman attached four examples of Grievant's writing to the forms to be reviewed by Ms. Dempsey. It is unclear why Mr. Blakeman approved the forms if he thought Grievant lacked the required skills to perform the job. Upon her review of Grievant's JCQ and PDF, which contained many errors, along with Mr. Blakeman's comments and the writing samples, Ms. Dempsey concluded that Grievant lacked the qualifications for the transportation engineering technician level 3 position, and decided not to submit them to personnel. Ms. Dempsey had some communication with District One management about her decision, and she suggested to them that Grievant take an English class. However, it appears that no one informed Grievant that his reallocation was not being

forwarded to DOP. Mr. McBrayer informed Grievant that there was some kind of problem with the reallocation, and told him to take an English class, but nothing was made clear to Grievant. Grievant took the class as he was told, and was frustrated when he did not get the reallocation upon completion. Such is why he filed this grievance. Apparently, at the time he filed this grievance, Grievant was still not aware that Ms. Dempsey had rejected his reallocation request. Someone should have explained to Grievant in November 2013 that Ms. Dempsey and Mr. Blakeman did not think that he was qualified for the transportation engineering technician level 3 position, and that as such, Ms. Dempsey would not approve and submit his reallocation request to DOP.

The issue then becomes whether Ms. Dempsey's actions in refusing to forward the reallocation request to DOP was somehow improper, or violated any law, rule, or policy. Grievant presented no evidence to establish what Ms. Dempsey's duties or responsibilities were. No policies or rules regarding the reallocation process were introduced into evidence, or referenced in Grievant's post-hearing submissions. The classification specifications for the position state that one of its essential job functions is communicating with the public and preparing written correspondence and reports.¹⁷ Also, the "ability to communicate effectively with the public and prepare written correspondence and reports" and the "ability to communicate effectively both orally and in writing" are two abilities identified as being required in the "Knowledge, Skills, and Abilities" section of the classification specifications, along with twelve others.¹⁸ Mr. Blakeman also testified that the ability to communicate in writing is an essential function

¹⁷ See, Respondent's Exhibit 6.

¹⁸ See, Respondent's Exhibit 6.

of the position. Grievant's November 2013 JCQ and PDF forms contain many grammatical and typographical errors. Many of these errors are so significant that it is difficult to understand what Grievant is trying to say. Further, the errors are so numerous and significant that they do not appear to be simple typos. The writing appears very unprofessional. While Mr. Blakeman only attached four examples of Grievant's writing, including two older emails, a report form, and a reference letter that was never sent out, these examples, coupled with the JCQ & PDF, demonstrate that Grievant's written communication skills were lacking. As written communication appears to be an integral function of the position, the undersigned cannot conclude that Ms. Dempsey's refusal to forward Grievant's reallocation request to DOP was arbitrary and capricious. Ms. Dempsey based her decision on the information she was given, and such was reasonable given the circumstances.

Grievant also asserts that Respondent acted in bad faith by intentionally delaying his reallocation, and that resulted in him being worked out of his classification for a year. Specially, Grievant asserts that Mr. Blakeman intentionally delayed his reallocation which kept him in the technician level two position over a year after he received his level three certification. In support of this, Grievant cites West Virginia Code § 6C-2-3(i), which states as follows: "[i]mproper classification—A supervisor or administrator responsible for a willful act of bad faith toward an employee or who intentionally works an employee out of a classification may be subject to disciplinary action, including demotion or discharge." *Id.* Grievant offered no other authority for his argument.

The evidence presented establishes that Mr. Blakeman received the PDF and JCQ from Grievant during the first week of November 2013, and he forwarded the same

to Ms. Dempsey on November 20, 2013. Grievant testified that the time it took Mr. Blakeman to process these documents was reasonable. While Grievant presented evidence to suggest that Mr. Blakeman made negative comments about the level three certification program and processing the reallocation paperwork, Mr. Blakeman still processed the documents in a timely manner. It was Ms. Dempsey who decided not to forward the reallocation documents to DOP. There was no evidence that Ms. Dempsey acted in bad faith, or intentionally worked Grievant out of his classification.

Therefore, the grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. See, Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990).

2. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v.*

Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

3. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. See *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. Grievant failed to prove by a preponderance of the evidence that Ms. Dempsey’s refusal to forward his reallocation request to DOP violated any rule, policy, or law. Grievant also failed to prove that Ms. Dempsey’s actions were arbitrary and capricious.

5. Grievant failed to prove by a preponderance of the evidence that Respondent intentionally worked him out of his classification. Grievant failed to prove his bad faith claim by a preponderance of the evidence.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA.

CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: May 29, 2015.

Carrie H. LeFevre
Administrative Law Judge